

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Application of SBC Communications, Inc. )  
Pursuant to Section 271 of the )  
Telecommunications Act of 1996 to )  
Provide In-Region InterLATA )  
Services in Oklahoma )

CC Docket No. 97-121

**PETITION TO DENY**

**SPRINT COMMUNICATION COMPANY L.P.**

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## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY .....	1
I. SBC HAS NOT DEMONSTRATED COMPLIANCE WITH TRACK A. ....	3
A. Section 271(c)(1)(A) Requires A Demonstration of Actual, Operational Competitors And A Finding That Competition Has Been Enabled. ....	4
B. There Is No "Facilities-Based" Competitor In Any of SBC's Local Exchange Markets. ....	9
1. Brooks Fiber Cannot Be Considered To Be Providing Its Services "Exclusively" Or "Predominantly" Over Its Own Facilities. ....	10
2. Unbundled Elements Do Not Satisfy 271.....	13
C. SBC's "Paper Offers" Of Interconnection And Access Fall Well Short Of The Statutory Requirement Of Actual Provision. ....	15
1. The Interconnection Must Be Operational and Proven. ....	16
2. The SGAT Cannot Be Used To Satisfy Track A's Requirements. ....	17
II. SBC HAS FAILED TO DEMONSTRATE COMPLIANCE WITH SECTION 271(C)(2), THE COMPETITIVE CHECKLIST .....	20
A. Checklist Compliance Cannot Be Assured Given The Uncertainty Of Rules And The Interim Nature Of Prices.....	20
B. Uncertainties Surrounding SBC's MFN Obligations Preclude Reliance On A Mixture Of Agreements. ....	22
C. SBC's Inability To Demonstrate Electronic Bonding Deployment Renders Its Application Defective. ....	24
D. SBC's Refusal To Provide Route Indexing Violates Its Obligation To Provide Even Interim Number Portability. ....	27
E. SBC's Pole Attachment Offerings Do Not Comply With The Checklist.....	31
III. SBC FAILS TO DEMONSTRATE THAT IT WILL PROPERLY COMPLY WITH THE SEPARATE AFFILIATE SAFEGUARDS OF SECTION 272. ....	32
IV. THE APPLICATION IS INCONSISTENT WITH THE PUBLIC INTEREST. ....	37

A.	The Commission has Expansive Powers Under the "Public Interest" Section of 271. ....	38
B.	SBC's Purported Public Interest Benefits Are Simply Conclusory Allegations Entitled To No Weight. ....	39
C.	Predictable Harm to the InterLATA Market Is Alone Sufficient Reason to Deny the Application. ....	40
1.	Discrimination. Is A Predictable Consequence Of SBC's Entry .....	41
2.	The Likelihood Of Cross-Subsidization Is Evident. ....	42
3.	Access Charge Reform Is A Prerequisite To Entry .....	45
CONCLUSION .....		47

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**PETITION TO DENY**

Sprint Communications Company L.P. ("Sprint"), by its attorneys, petitions the Commission to deny the above-captioned application of SBC Communications, Inc. ("SBC").

**INTRODUCTION AND SUMMARY**

SBC's filing must be rejected. The record already demonstrates that SBC is ineligible to seek Track B authority and has failed to meet the requirements of Track A.<sup>1</sup> As Sprint and others have shown, summary dismissal should issue on this basis alone. Nevertheless, because the instant application is the first Section 271 application to be fully briefed before the FCC, Sprint sets forth further analysis of the statutory requirements and SBC's failure to meet them.

SBC's voluminous filing cannot mask one basic, crucial fact: there are no operational, interconnecting competitive local exchange carriers with their own facilities offering competitive alternatives in the state of Oklahoma. Further, SBC has failed to identify any CLEC actually purchasing unbundled network elements. By SBC's own admission, most elements of the competitive checklist are merely offered by SBC but are not actually being

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<sup>1</sup> See ALTS Motion To Dismiss, CC Docket No. 97-121 (April 23, 1997); Sprint Comments in Support (April 28, 1997).

supplied to competitors, and some of the elements, particularly SBC's operational interfaces, are not truly offered even as a theoretical matter. Further, the prices at which many items are offered are interim and not derived in accordance with TELRIC methodology.

Those few interconnection arrangements which SBC is actually providing are the subject of significant controversy with CLEC complaints of inadequate provisioning. The absence of meaningful operational readiness is described at length in the Affidavit of Ms. Cynthia Meyer, Sprint's Local Market Development Director (Attachment A).

In enacting Section 271, Congress assigned to the Commission the critical tasks of promoting and assessing competitive conditions in the local exchange markets. It determined that interLATA entry by the petitioning BOC would not be appropriate until and unless the FCC is able to find that the barriers to local entry have, in fact, been effectively lowered, that genuine facilities-based competition has emerged, and that the presence of such competitors effectively restrains the BOC's ability to use its local monopoly to harm competition in the long distance market. As the analysis of Professor Carl Shapiro (Attachment B) explicates in detail, there is no basis in this record to make these critical findings for Oklahoma. To the contrary, the application in fact demonstrates that SBC's near-absolute power in the local exchange market remains unchecked such that grant of the application would eliminate SBC's incentives to cooperate in the introduction of local competition. It would also provide SBC with both the opportunity and the incentive to harm competition in the interLATA market.

SBC tries unsuccessfully to mask the dramatically adverse public interest implications of its proposal by portraying a distorted view of the interLATA market and the supposed contributions it might bring to it. As explicated in the attached paper, "Flaws in the Public Interest Analysis of SBLD InterLATA Entry," however, the interLATA market is robustly

competitive; SBC's premature entry threatens the competitive efficiency of the market.

SBC seeks entry into the competitive long distance market long before it has taken the requisite steps to open up its monopoly lock on the local telephone market. Both market and regulatory conditions demonstrably exist such that the dangers of discrimination and cross-subsidization which led to the interLATA restriction ab initio persist. To allow BOC entry under such conditions would create both ratepayer and competitive harm at odds with the fundamental objectives of the 1996 Telecommunications Act.

The harm that would result to the interLATA market from premature entry would be swift and irreversible. Through Section 271, and most especially the public interest provision of that section, Congress tasked the FCC with the responsibility of ensuring that BOC entry would not occur until and unless the local telephone monopoly stranglehold was dissipated. Congress enacted Section 271 not because it disagreed with the interLATA restriction, but because it believed that restriction can and should be lifted *when the conditions are right*. SBC does not even come close.

#### **I. SBC HAS NOT DEMONSTRATED COMPLIANCE WITH TRACK A.**

Section 271(c)(1)(a) was designed to ensure that petitioning BOCs were not granted interLATA entry until and unless the FCC found that genuine facilities-based entry has emerged. To that end, a BOC seeking interLATA entry must demonstrate that it has entered into interconnection agreements that have been approved under Section 252 and pursuant to which the BOC "is providing access and interconnection" to unaffiliated providers of "telephone exchange service (. . . excluding exchange access) to residential and business subscribers." See 47 U.S.C. § 271(c)(1)(A) (emphasis added). Further, the competing providers must offer local service "exclusively" or "predominantly" over their own telephone

exchange service facilities. Id. (emphasis added).

SBC has constructed its entire Track A argument on the single, incorrect assertion that "Brooks Fiber [ ] serves both business and residential customers in Oklahoma and offers its service exclusively or predominantly over facilities it owns or obtains from a party other than [SBC]." (Br. at 12). The record demonstrates, however, that Brooks Fiber is not commercially providing residential service on any basis, let alone over its own facilities. Although this fact should by itself result in denial of SBC's application, Sprint sets forth below the additional standards applicable to Track A.

**A. Section 271(c)(1)(A) Requires A Demonstration of Actual, Operational Competitors And A Finding That Competition Has Been Enabled.**

SBC contends at great length that it need not show any particular level of competition. (Br. at 9). Sprint agrees that Section 271 does not require the FCC to find any specific numerical market share gained by CLECs before grant of an application can be made, but the absence of a metrics test by no means suggests that Congress was indifferent to actual competitive entry. Congress in fact opted for a qualitative test, one that would more fully ensure that BOCs faced local exchange competition in both the business and residential markets thereby reducing the risk to competition posed by BOC entry into the long distance market. As explained by Professor Shapiro, substantial commitment must be observable to ensure that entry barriers have in fact been lowered and competition has indeed been enabled.

It is simply not credible that SBC's power in the local exchange (and its corresponding power to harm competition in the long distance market) is at all curbed by the paltry amount of competition it has pointed to in its application; namely, Brooks Fiber's service to 20 business customers in the entire State of Oklahoma, of which the majority receive their service over lines

resold from SBC. See Brooks Fiber Comments at 2, OCC Docket No. 97-0000064 (March 11, 1997)(Vol.4, Tab 23).

SBC's grand pronouncements about the state of local competition in Oklahoma amount to much ado about nothing because, as shown, nothing is happening. SBC remains the monopoly provider of telephone exchange service in Oklahoma.<sup>2</sup> In its brief, SBC boasts that it has "sixteen negotiated interconnection agreements and resale agreements, of which six have been approved by the OCC." (Br. at 4). That claim is deflated by SBC's own affidavits which show that only a small number of the sixteen agreements are with prospective facilities-based competitors. (Stafford Aff. ¶ 15; Zamora Aff. ¶ 24). In fact, as SBC admits, two of the six approved agreements relied on by SBC to establish satisfaction of Section 271 are for resale only (Stafford Aff. at ¶¶ 14-15).

More importantly, SBC faces no competition from the four prospective facilities-based competitors (Brooks, Sprint,<sup>3</sup> ICG, and USLD). Brooks Fiber is the only one of the four companies that has interconnected its network with SBC's network. The record reveals that Brooks has no more than 20 customers in the entire State of Oklahoma and that such customers are being provided exchange service primarily through resale.<sup>4</sup> SBC has supplied

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<sup>2</sup> SBC notes that CLECs plan to begin competing in Tulsa and Oklahoma City. (Wheeler Aff. ¶ 6). Even if SBC faced workable competition in those cities -- which it does not -- those two cities account for less than 25% of Oklahoma's population.

<sup>3</sup> Sprint's current plans are not to enter Oklahoma immediately as a facilities-based provider but instead to begin as a reseller of SBC's services. Sprint will then transition to combinations of unbundled network elements coupled with its own facilities. (Meyer Aff. ¶ 31).

<sup>4</sup> Brooks has also been unable to obtain physical collocation with SBC because SBC has not completed any of the eleven such collocations requested by Brooks despite the fact that some of the requests date back to June 1996. See Brooks Fiber Comments, at 3, Vol. IV, Tab 23.

no information that would permit the Commission to find that any of the other three so-called competitors has any customers.<sup>5</sup>

SBC's other "evidence" of competitive entry exists largely in affidavits by employees who have collected some news stories (although they apparently stopped collecting stories sometime last year). (Wheeler Aff.; Montgomery Aff.). For example, SBC points to several news articles concerning cable companies to support a claim that it is "at risk" of losing its customers. (Wheeler Aff. ¶¶ 9-16; Montgomery Aff. ¶ 10). Those companies, however, pose no threat to SBC. As admitted in SBC's own affidavits, Cox is not going to provide phone service to the public until it first completes a "trial" with fifty of its employees. (Wheeler Aff. ¶ 10). SBC's worries about competition from other cable companies appear somewhat neurotic since many cable companies have publicly announced substantial curtailment of earlier plans to enter the local exchange market at this time.<sup>6</sup>

It is certainly untenable that any of this activity -- real or imagined -- in any way represents a check on SBC's market power. Newspaper accounts (even when updated for

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<sup>5</sup> SBC, as the applicant, has the burden of demonstrating compliance with all terms of Section 271. See, e.g., AT&T Application For Authority Pursuant to Section 214, Memorandum Opinion, Order, and Authorization, 52 F.C.C. 2d 128, 133 (1975)(applicant has burden of demonstrating compliance with Section 214); Ranger v. FCC, 294 F.2d 240, 242 (D.C. Cir. 1961)(applicant must respect the requirements for a broadcast application). See also Reed E. Hundt, FCC Chairman, Speech before the Competition Policy Institute (Jan. 14, 1997)("No one disagrees that it is the Bell companies that carry the burden of proof in demonstrating that they have met their side of the Congressional deal and opened their local networks to competition.").

<sup>6</sup> See Mark Robichaux, "Bad Call: Malone Says TCI Push Into Phones, Internet Isn't Working For Now," Wall St. J., Jan. 2, 1997 at 1 (TCI is "retreat[ing]" from telephony and "has zero revenue from residential telephone service."). SBC's fears of competition from Multimedia Cablevision seem particularly misplaced as they are based on a 1994 news article stating that the company was deploying a fiber optic network outside of Oklahoma City. That article is nearly three years old and SBC still faces absolutely no competition from that company.

accuracy) describing plans to enter by some firms cannot substitute for competent evidence of real entry. Congress's desire to link BOC interLATA entry to the elimination of the BOC's monopoly bottleneck in the local exchange market would be sabotaged by ignoring this basic fact.

As noted above, SBC also relies upon its negotiated, OCC-approved agreement with Sprint. The FCC should make no mistake as to Sprint's current ability to rely upon this agreement to enter the local exchange business in Oklahoma, however. SBC still controls entry absolutely in these markets, and the agreement in its current state does not alter this. The agreement between Sprint and SBC represents only the initial steps toward getting SBC to meaningfully share key inputs that allow competitive entry.

Before the Sprint-SBC interconnection agreement is useable, existing terms will have to be altered to provide for both certainty and non-discrimination. The Sprint-SBC agreement itself is not substantively final in at least two distinct ways. First, the contract on its face reveals two outstanding issues that are left expressly unresolved by the Parties and that may have to be resolved through application to the OCC for formal dispute resolution. (Sprint Agreement; Meyer Aff. ¶ 5). The absence of resolution on these two issues alone renders the agreement too imprecise to allow Sprint to go forward at this time. The first issue, involving SBC's billing practices for resale, demonstrates that SBC is not providing parity to competitors because, unlike the manner in which SBC treats its local service operations, it is seeking to make Sprint "pay for all services furnished under this Agreement even where Sprint customers deny knowledge of obtaining the services." (Attachment 4, § 2.2 of Sprint Agreement). Similar disparities are shown in the second issue involving the collocation necessary to order and utilize unbundled network elements. (Attachment 6, § 2.1 of Sprint

Agreement). Access to unbundled network elements is of course central to the statutory scheme and to commercial operations; definitive resolution of this issue is a necessary precondition to Sprint's entry in Oklahoma.

Second, it is Sprint's clear expectation and understanding that SBC has agreed to amend the pricing terms to reflect more reasonable rates developed in other proceedings and/or agreements. As a matter of business judgment, Sprint believes that the current pricing levels in the agreement would not permit entry, since they would disable Sprint from pricing competitively with SBC for the same local customers. (Meyer Aff. ¶ 6). The prices reflected in the Agreement are outside the FCC's required methodology, and in fact, are unreasonably high. Sprint agreed to the pricing terms only because it understood that the prices will be revised pending the outcome of the OCC's cost proceedings and/or pursuant to Section 252(i).

Sprint thus signed the agreement with specific and express reservations that numerous terms would have to change. Even once these concerns are resolved, numerous other "checklist" issues initiated in the agreement between SBC and Sprint will require substantial work before real interconnection can occur under the agreement, such as number portability and OSS. These issues are discussed in greater detail in Section III, infra.

Notwithstanding these uncertainties, Sprint has chosen to proceed to work with SBC to develop workable interconnection arrangements that will ultimately permit Sprint to enter the local exchange market. Sprint wants to make clear, however, that it views its agreement with SBC as only a "beginning framework" (Meyer ¶ 7) which will require the investment of substantial time and energy and the favorable resolution of a number of legal uncertainties before any fair view of the local market could include Sprint as a competitive factor. Given the inchoate nature of the arrangements, it is clear that, rather than showing that

interconnection has been achieved, its "contract" with SBC demonstrates that interconnection is not yet a reality in Oklahoma.

**B. There Is No "Facilities-Based" Competitor In Any of SBC's Local Exchange Markets.**

As noted above, the statute requires not only some retail competition -- it requires operational, facilities-based competitors. The central characteristic of a facilities-based competitor is its freedom from reliance on the incumbent LEC's facilities. Thus, in order to meet the requirements of Section 271(c)(1)(A), there must be one or more competitors with sufficient market presence, in the form of their own facilities, to provide both local business and residential subscribers a meaningful alternative to SBC. Such carriers must own and control their facilities, and it is particularly important that such carriers own significant local loop facilities. The mere leasing of local loop elements from SBC continues the current dependence upon SBC and is therefore insufficient.

As discussed more fully in Professor Shapiro's Declaration, the central issue for the Commission under Section 271 is to ensure that the local market has been opened. The best way to make that determination, as Congress recognized, is to observe competitors with independent network facilities that provide meaningful alternatives to the incumbent LEC for the provision of access and local services.

SBC relies on Brooks Fiber as the "facilities-based" competitor necessary for SBC to demonstrate Track A compliance. Brooks Fiber's continuing dependence on SBC disqualifies it as "facilities-based" within the meaning of the statute.

**1. Brooks Fiber Cannot Be Considered To Be Providing Its Services "Exclusively" Or "Predominantly" Over Its Own Facilities.**

SBC argues that Brooks is "predominantly" a facilities-based carrier. (Br. at 11-12).

Characterizing local exchange facilities as consisting of three principal network elements -- local loops, local transport, and local switching -- SBC asserts that Brooks "takes at most one of these elements from [SBC]" and thus "the test of predominance is met." *Id.* SBC's argument collapses because Brooks does not serve a majority of its business customers and a majority of its residential customers with its own loops. That Brooks has some independent facilities of some sort will not suffice under the terms of the statute. As Sprint shows below, a CLEC that qualifies under Track A must serve a majority of its business customers and a majority of its residential customers with loops (and other plant) that it owns independent of any resale or access (UNE) arrangements with the ILEC.

These requirements flow as a matter of law and policy. First, the term "predominantly" should be given its common meaning, that is, "having ascendancy, influence, or authority over others; superior; dominating; controlling."<sup>7</sup> At a minimum, this means more than 50%, as measured, e.g., by investment.<sup>8</sup> This construction explicates the statutory term

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<sup>7</sup> Webster's New Twentieth Century Dictionary Unabridged (1979).

<sup>8</sup> The FCC has consistently interpreted the term "predominantly" to mean more than 50%. See e.g., Complaint of WNYC Communications Group Against Time Warner City Cable Group Request for Carriage, 8 FCC Rcd. 3925 at ¶ 4 (1993); Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 2965 ¶ 4, 5 (1993). Many federal courts of appeals have adopted similar definitions. See Price v. Denison Indep. Sch. Dist., 694 F.2d 334, 361 n.54 (5th Cir. 1982)(the term predominantly "implies . . . enrollment 'substantially' over 50 percent"); Bing Crosby Productions, Inc. v. United States, 588 F.2d 1293, 1299 (9th Cir. 1979)("As long as the property was located within the United States for fifty percent of the year, then its predominant use is considered to be within the United States."); Katharine Gibbs Sch., Inc. v. FTC, 612 F.2d 658, 668 (2d Cir. 1979) (using "predominantly" to refer to a majority). Congress can be attributed with knowledge and acceptance of the FCC's and the courts' traditional construction of the term and thus these precedents should be followed in the case of Section 271. See Florida Nat'l Guard v. Federal Labor Relations Auth., 699 F.2d 1082, 1087 (11th Cir.)("Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it

as a quantitative measure, and it necessarily applies to the "facilities" deemed to be included within the section. Second, the term "predominantly" also must be construed as a qualitative measure. SBC's argument fails to comprehend the predominance requirement because it ignores the need to consider the competitive significance of the interconnector's own network facilities. Independent back-office operations, for example, are important, but they do not by any means represent the undoing of the bottleneck which SBC and other Bell Operating Companies enjoy.

Local loops represent the most competitively significant plant. Local loop investment is by far the most financially significant investment, simply as a matter of dollars expended. But it also means true sunk costs, and thus a real commitment by a competitor to market entry and growth. The loop also represents the most significant source of the incumbent LEC's bottleneck control. The term "predominantly," then, should also be understood to include independently owned local loop facilities.

Third, in order to read the term "predominantly" consistently with the terms of the statute and with its goals, the FCC must also make clear that the requirement applies separately to residential and business classes of customers. The subsection specifically sets forth both classes of customer as the intended beneficiaries of local competition. It is not sufficient for a BOC to point to a CLEC with its own business loops but only resold or unbundled residential loops. To assert otherwise, as SBC implicitly does, is to assert that Congress wanted business customers to have a real competitive choice but didn't care to promote meaningful alternatives for residential consumers.

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affirmatively acts to change the meaning. Congressional silence in the Act indicates acceptance of the prior practice."), cert. denied, 464 U.S. 1007 (1983).

While this test is rigorous, it is the one required by Congress. Indeed, the legislative history is clear that the "predominantly" requirement was actually Congress's second choice behind its "exclusively" requirement. Congress offered this fallback out of a pragmatic recognition that some competitive activity short of an entirely separate independent local exchange network might still satisfy the policy objectives of Section 271(c)(1)(A). For example, the Conference Committee Report states as follows:

This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (e.g., central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.<sup>9</sup>

As this statement demonstrates, Congress allowed a carrier providing services "predominantly" over its own independent facilities to qualify under Section 271(c)(1)(A) solely because it thought it unlikely that there would be any facilities-based competitors with "exclusively" their own facilities in the market. The import is that a carrier qualifying as facilities-based would, under any circumstances, have substantial independent facilities. If this were not Congress's intent, there would have been no need even to discuss the likely existence of "redundant" networks that may need to lease "some" of the incumbent's network in describing the purpose of Section 271(c)(1)(A).

For these reasons, it is not enough for a BOC to demonstrate that some transmission and switching is achieved over a CLEC's own facilities; both residential and business local exchange services must be offered over independent loop facilities. The goal of Section 271 and the 1996 Act in general is to have local competitors construct and operate genuine

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<sup>9</sup> S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 148 ("Conference Report").

facilities-based alternatives to the incumbent, so that the incumbent's monopoly power will be dissipated, and consumers -- business and residential -- will be able to enjoy the benefits of real choices in service quality, technology and value. This level of market entry has not been achieved here.

## **2. Unbundled Elements Do Not Satisfy Section 271.**

As noted above, SBC's application reflects only the theoretical availability of unbundled network elements. SBC appears to equate unbundled or leased network elements with a competitor's own independent network. (Br. at 11-12 & n.13). At the outset, Sprint notes what SBC's brief omits: SBC is not actually providing any unbundled network elements. (Lowrance Aff. ¶ 14). But even if SBC were taking the necessary step of making UNEs operationally usable and in use,<sup>10</sup> SBC would still be unable to satisfy Track A on this basis.

Section 271(c)(1)(A) is satisfied only where one or more competitive LECs offer service to both residential and business subscribers either exclusively or predominantly over facilities that they own. This is clearly the most natural and logical reading of the phrase "over their own telephone exchange service facilities" in Section 271(c)(1)(A).

Under SBC's strained interpretation, a carrier that provides service exclusively or predominantly over leased elements would meet the Section 271(c)(1)(A) standard. Carrying this argument to its logical end, SBC would have the Commission believe that a carrier with no independent network facilities whatsoever should qualify as a "facilities-based" carrier.

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<sup>10</sup> That no one is taking UNEs from SBC is hardly surprising, given the many roadblocks it has set up to impair such usage. For example, SBC has taken the legal position before this agency that intellectual property laws preclude full access under Section 251.

There is no support in the language of the provision for the view advanced by SBC. Section 271(c)(1)(A) does not even mention leasing of unbundled elements. As demonstrated by Sections 251(c)(3) and 252(d)(1), Congress was fully capable of referring explicitly to leasehold arrangements when it chose to do so.<sup>11</sup>

Moreover, Congress's concern with the prospects of local competition in its explanation of the meaning of Section 271(c)(1)(A) again shows its intent that facilities-based carriers would own distinct physical facilities. The Conference Report discusses at length the "meaningful facilities-based competition" made possible by the fact that "cable services are available to more than 95 percent of United States homes." (Conf. Rep. at 148). As the Conference Report concludes, "[s]ome of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated." *Id.* (emphasis added).

In addition to the obvious weakness in its legal argument, SBC's approach would be extremely bad policy. See generally Shapiro Declaration (passim). The underlying policy considerations were fully set out such that Congress was well aware of the alternatives.<sup>12</sup> Pure

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<sup>11</sup> Furthermore, Section 271(c)(1)(A) specifically states that carriers providing solely "exchange access" would not meet the requirements of Section 271(c)(1)(A). This statement again shows that Congress expected that facilities-based providers would own their own loops, since competitive access providers must rely on the incumbent LECs' loops to carry switched traffic.

<sup>12</sup> For example, the explanation given by the United States Department of Justice of the limits of resale in the context of SBC's 1995 request to receive limited in-region interLATA relief was part of the legislative record:

Resale competition is not a replacement for facilities-based competition. It brings competition only to the marketing of local exchange services, and it requires extensive regulations to ensure that the prices, terms, and conditions under which [SBC] offers the underlying service make resale meaningfully available.

resale offers local subscribers, local competitors, and long distance carriers virtually no protection against the abuses of BOC monopoly power. Moreover, leasing of unbundled elements offers little more protection than pure resale of the BOC's end user services. A lessor under Section 251 does not in any meaningful sense "control" the element it leases; that control resides exclusively with the incumbent LEC. SBC does not take issue with this, unsurprisingly. Under either arrangement, the bottleneck facilities remain, and the BOC retains full control over them.

SBC has failed to carry its burden of demonstrating that it is providing interconnection and access to facilities-based local competitors who are providing independent service exclusively or predominantly over their own networks. As shown, SBC's application should be dismissed for failure to comply with Section 271(c)(1).<sup>13</sup>

**C. SBC's "Paper Offers" Of Interconnection And Access Fall Well Short Of The Statutory Requirement Of Actual Provision.**

Even if Brooks Fiber somehow permitted SBC to move forward with its Track A application, the application would still fall for failure to meet the "operational" requirement for access and interconnection. According to SBC, simply entering into an interconnection agreement complies with the statute. (Br. at 16-17). Alternatively, SBC argues that a filed SGAT will suffice. SBC is wrong on both counts. (Id. at 15-17).

**1. The Interconnection Must Be Operational and Proven.**

Section 271(c)(1)(A) plainly requires that at least one carrier must have reached a

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Inserted into the record by Senator Byrd, 141 Cong. Rec. S5969 (daily ed. May 2, 1995).

<sup>13</sup> See Salzer v. FCC, 778 F.2d 869 (D.C. Cir. 1985)(upholding dismissal of LPTV application for failure to reflect "offset operation[s]" as required by the agency's rules).

binding interconnection agreement with SBC under which access and interconnection services are being provided. The statute's plain language requires that the "access and interconnection provided pursuant to subsection (c)(1)(A)"<sup>14</sup> by the Bell Company must "include[ ] each of the" checklist items<sup>15</sup> and further, the Bell Company be able to show that it has "fully implemented" the competitive checklist items. Satisfaction of the statute therefore requires proof that SBC is "providing" each of the fourteen elements of the competitive checklist to one or more facilities-based competitors which are, in fact, operational in the local market. SBC has not made this showing.

In fact, SBC admits that it is not actually providing all items of the checklist to any CLEC.<sup>16</sup> Yet, it contends that "this presents no obstacle to showing compliance with the checklist" because it would be "nonsensical [to] interpret[ ] the Act as requiring competitors actually to take all checklist items." (Br. at 16-17). According to SBC, it need only offer such items without regard to whether CLECs "choose to indulge." (Id. at 16-17 & n.17). That assertion defies the statute and common sense; the fact that all checklist items are theoretically available in a contract does not translate into the statutory standard that each and every checklist item is actually being "provided" by SBC. The use of the present tense indicates that Congress intended that a BOC be in the business of providing access and interconnection to operational competitors in order for subsection (c)(1)(A) to be met. Thus, the incumbent must have received and satisfied service requests from the new entrants, and

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<sup>14</sup> Section 271(d)(3)(A)(i).

<sup>15</sup> Section 271(c)(2)(B).

<sup>16</sup> See Br. at 16 ("Brooks Fiber and other CLECs will not need or want to take every checklist item from SBC."); Lowrance Aff. ¶ 14 ("No orders have yet been placed for unbundled elements.").

actually be exchanging residential and business local traffic with them.

While resort to legislative history is unnecessary, it too supports this interpretation. The Conference Report (p.148) states that "[t]he requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational." That explanation could not be clearer.

Congress thus understood the commercial realities: there is a wide divide between making certain functions and features conceptually available and actually providing them in a useful, commercially viable manner. The public policy reasons for requiring that the BOC actually be providing the requisite interconnection are thus clear. As more fully explicated by Professor Carl Shapiro in Attachment B, requiring operational provisioning of access and interconnection is the only method to ensure that the BOC will have taken the necessary steps -- otherwise against its self-interest -- to open up its local bottleneck facilities to permit competitive entry.

## **2. The SGAT Cannot Be Used To Satisfy Track A's Requirements.**

For these same reasons, SBC's argument that it can use its Statement of Generally Available Terms ("SGAT") to show compliance with Track A must fail. As already noted, Congress specifically and carefully distinguished between the active provision of access and interconnection required under Track A and the offering of access and interconnection required under Section 271(c)(1)(B) ("Track B"). For example, each of subsections 271(c)(1)(A), (c)(2)(A)(i)(I), and (d)(3)(A)(i) requires that the BOC is providing access and interconnection in order to meet Track A. In contrast, in subsections 271(c)(1)(B), (c)(2)(A)(i)(II) and (d)(3)(A)(ii), all provisions describing the obligations of the BOC pursuant to Track B, the statute states only that the BOC must offer or be offering access and

interconnection.

Section 271(c)(2)(B), the provision dealing with checklist compliance, contains two entirely independent means of compliance. Under Track A, the BOC must provide CLECs the checklist items pursuant to interconnection agreements only while under Track B the BOC must offer the items pursuant to an approved SGAT only. Section 271(c)(2)(B) states as follows:

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following . . . . (emphasis added).

As used in this subparagraph, the term "provided" matches the phrase "is providing" in Sections 271(c)(1)(A) and (c)(2)(A)(i)(I) as well as the term "provided" used in Section 271(d)(3)(A)(i). All of these provisions refer to compliance with Track A. As used in Section 271(c)(2)(B), the phrase "generally offered" matches the use of "generally offers" in Section 271(c)(1)(B), "is generally offering" in Section 271(c)(2)(A)(i)(II) and "generally offered" in Section 271(d)(3)(A)(ii). All of these provisions refer to compliance with Track B. Thus, as stated in Section 271(c)(2)(B), access and interconnection "provided" refers to Track A while the access and interconnection "generally offered" refers to Track B.

The use of the disjunctive "or" in Section 271(c)(2)(B) demonstrates that a BOC must either comply with the competitive checklist contained in that subparagraph exclusively through Track A or exclusively through Track B, whichever track is applicable under the given facts. As the Supreme Court has held, "canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meaning, unless the context dictates otherwise." Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). The "context" of Section 271 reinforces the view that Tracks A and B cannot be used in combination: every place the

two Tracks are mentioned in Section 271, they are stated in the disjunctive. For example, Section 271(c)(1) states that a BOC meets the requirements of that paragraph "if it meets the requirements of subparagraph (A) [Track A] or subparagraph (B) [Track B]" (emphasis added). Section 271(c)(2)(A) similarly states that a BOC meets the requirements of that paragraph if, within the state for which the authorization is sought, the company complies with Section 271(c)(1)(A) or Section 271(c)(1)(B). Section 271(c)(2)(B) restates these options in the disjunctive again.

Finally, Section 271(d)(3)(A) requires that a BOC has either "fully implemented" the competitive checklist pursuant to Track A or "offers all of the items included in the competitive checklist in subsection (c)(2)(B)" (emphasis added) pursuant to a Track B general statement. Section 271(d)(3)(A) again unmistakably shows that the competitive checklist must be fulfilled either entirely pursuant to one or more Track A interconnection agreements or entirely pursuant to a Track B general statement.

SBC complains that since some competitors might not need all of the checklist items or in some cases no competitor would need a checklist item, it must be possible for BOCs to satisfy the checklist by combining Tracks A and B. (Br. at 15-17). But this is simply a plea to ignore the terms of the statute. The words and phrases of Section 271 clearly demonstrate that Tracks A and B are independent. Thus, given SBC's ineligibility for Track B, it must satisfy the checklist via Track A. This, SBC cannot do.

## **II. SBC HAS FAILED TO DEMONSTRATE COMPLIANCE WITH SECTION 271(C)(2), THE COMPETITIVE CHECKLIST.**

Section 271(c)(2)(B) requires that the specific access that is being provided<sup>17</sup> meet "each" of the items set forth in the competitive checklist of that section, including most especially interconnection "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)," and "non-discriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," the critical pricing provisions. With respect to those checklist items which, by statute, must be fully implemented prior to lawful grant of interLATA entry, the following discussion shows that SBC has not, under any reasonable interpretation, "fully implemented" the checklist. Its filing is simply defective and premature.<sup>18</sup> The statute does not allow SBC to "promise" to fulfill its obligations after it gets what it wants.

Sprint does not here attempt to identify every aspect of every item of the checklist which SBC has failed. Rather, Sprint below has selected a few illustrative problems, any one of which would alone warrant dismissal.

### **A. Checklist Compliance Cannot Be Assured Given The Uncertainty Of Rules And The Interim Nature Of Prices.**

Section 271(c)(2)(B) requires that the access and interconnection provided by the applicant BOC is providing be in accordance with the requirements set forth in Sections 252(c)

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<sup>17</sup> That "providing" means the actual furnishing as opposed to merely making available has been addressed above.

<sup>18</sup> It is not possible for SBC to meet the statute since it admits that "[n]o orders have yet been placed for unbundled elements." See Lowrance Aff. ¶ 14. Moreover, notably absent from Mr. Deere's or Mr. Kaeshoefer's affidavit is any discussion whatsoever concerning the actual provision of any network related elements to CLECs. Indeed, Mr. Kaeshoefer frankly admits that SBC currently is "furnishing service" to only Brooks and a reseller. (Kaeshoefer Aff. ¶ 6).

and 252(d). Given the Eighth Circuit appeal, it is not at all clear whether the FCC's rules will hold, whether the FCC will be able to enforce the rules only as to interstate communications, or what rules and enforcement provisions will control intrastate communications. This uncertainty alone casts doubt on any assertion of Section 271 compliance: how can SBC claim compliance with provisions whose implementation depends upon rules that have been suspended by the Circuit Court? Moreover, SBC itself insists that all agreements and its SGAT must be ultimately modified to reflect the outcome of the appellate proceedings in the Eighth Circuit. (Kaeshoefer Aff. ¶ 7; Stafford Aff. ¶ 9 n.2). Given these circumstances, verification of the checklist compliance cannot be made at this time.<sup>19</sup>

The uncertainty increases by multiples in light of the fact that the rates set forth in the interconnection agreements relied upon by SBC are expressly interim in nature. Although SBC contends that its prices for unbundled network elements are cost-based,<sup>20</sup> it admits that the OCC has yet to develop cost studies and fully develop permanent TELRIC rates. (Br. at 21-22). In fact, the "interim" rates adopted in the AT&T arbitration are almost certainly too high given the arbitrator's observation that "if a true-up is needed in the future, [refunding money] would be easier to explain to customers rather than trying to explain a lower price being trued-up to a higher price." (AT&T Arb. Order, Vol. III, Tab 9 at 20).

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<sup>19</sup> For this reason, the FCC should assert the applicability of its interconnection rules to Section 271, regardless of whether these rules are upheld under Sections 251 and 252. Entry should not be permitted until all appeals are exhausted.

<sup>20</sup> SBC contends that it "used TELRIC-based cost studies consistent with the Commission's pricing rules despite the Eighth Circuit's stay of those rules" (Br. at 22 n.22) but apparently only for some items, since some elements are priced using tariffed rates or other costs. *Id.* Further, SBC has also stated that it "does not agree that prices set at forward-looking economic costs are the absolute and proper basis for determining rate levels applicable to unbundled elements." (Kaeshoefer Aff. ¶ 17). SBC further repeats that it has not waived "any legal right to have prices reflect actual costs." Br. at 22 n.22.

Sprint also notes that many of the rates in its agreement are well above the FCC's proxy costs. For example, Appendix D to the FCC's Interconnection Order<sup>21</sup> noted that the state proxy ceiling in Oklahoma for unbundled loops was \$17.63 whereas the lowest price offered by SBC was \$20.70. (Sprint Agreement-Appendix Pricing-UNE at 48, Vol. III, Tab. 5). Likewise, the FCC's proxy per minute for unbundled local switching costs was \$0.002-\$0.004 (Interconnection Order ¶ 811) as compared to SBC's lowest cost of \$0.0058 (Sprint Agreement-Appendix Pricing-UNE at 49, Vol. III, Tab 5).

**B. Uncertainties Surrounding SBC's MFN Obligations Preclude Reliance On A Mixture Of Agreements.**

As noted, it is not known at this time whether the Commission will be able to fully enforce the "most favored nation" obligation of SBC as set forth in Section 252(i). That section requires LECs to make available "any interconnection, service or network element" provided under an interconnection agreement to which it is a party "to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." The most favored nation provision thus establishes the central mechanism for enforcing the requirement that access and interconnection services on the checklist be truly available and provided in a nondiscriminatory manner.<sup>22</sup>

As the FCC recognized in the Interconnection Order (¶ 1310), this scheme will work only if third parties can obtain access to any individual interconnection, service or network

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<sup>21</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185 at App. D (rel. Aug. 8, 1996) ("Interconnection Order").

<sup>22</sup> See 47 U.S.C. § 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii). In addition, incumbents are required to provide interconnection, access to unbundled elements and the other services mandated by Section 251(c) on a nondiscriminatory basis. See, e.g., 47 U.S.C. § 252(c).